

State of California

Public Utilities Commission
San Francisco

M E M O R A N D U M

Date : August 15, 2006

**To : The Commission
(Meeting of August 24, 2006)**

**From : Laurence G. Chaset, Legal Division
Keith White, Energy Division**

Subject : Staff Seeks Authority to File Comments in Response to the Federal Energy Regulatory Commission's Notice of Proposed Rulemaking, Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors (FERC Docket No. RM06-12-000), issued June 19, 2006.

INTRODUCTION:

On August 8, 2005, the federal Energy Policy Act of 2005 ("EPAct") became law. Section 1221 of EPAct adds a new section 216 to the Federal Power Act ("FPA"), providing for federal siting of electric transmission facilities under certain circumstances. FPA section 216 requires that the Secretary of Energy ("Secretary") identify transmission constraints and authorized the Secretary to designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a National Interest Electric Transmission Corridor ("NIETC"). Once a NIETC has been designated, the Federal Energy Regulatory Commission ("FERC") has the authority under FPA section 216(b) to issue permits to construct or modify electric transmission facilities in such corridors under certain circumstances.

Specifically, FERC has the authority to issue permits to construct or modify electric transmission facilities if it finds that the State commission or entity with siting authority withholds approval of the facilities for more than one year after an application is filed or one year after the designation of the relevant NIETC, whichever is later, or the State conditions the construction or modification of the facilities in such a manner that the proposal will not significantly reduce transmission congestion in interstate commerce or is not economically feasible.

FPA section 216(c)(2) requires that the FERC issue rules specifying the form of, and the information to be contained in, an application for proposed construction or modification of electric transmission facilities in a designated NIETC, and the manner of service of notice of the permit application on interested persons. In this Notice of Proposed Rulemaking, FERC has proposed to implement new siting procedure regulations, as well as certain modifications to other, existing regulations, including the FERC's regulations implementing the National Environmental Policy Act of 1969 ("NEPA").

Staff seeks the Commission's authorization to file comments on FERC's proposed siting regulations. These comments must be submitted by August 28, 2006. Because of the time constraints under which we are operating, staff will need further time to fully develop its comments. We are accordingly seeking the Commission's approval to submit comments that are consistent with the various policy points set forth below.

DISCUSSION:

Based on its review of the FERC's NOPR, staff is of the view that it should file comments covering the following points:¹

- The proposed new regulations for managing the backstop siting process do not provide adequate explanation of how FERC will interpret and apply the criteria for initially triggering backstop siting and the process that will be used to do this.
- The proposed new regulations do not adequately explain how FERC will interpret the language in EPAct that mandates an applicant to demonstrate that a proposed facility located in a NIETC is consistent with the public interest, will significantly reduce congestion and protect or benefit consumers, is consistent with national energy policy and will enhance energy independence, and will maximize to the extent reasonable and economical the transmission capabilities of existing towers or structures.
- The proposed regulations need to clarify how FERC will determine whether and when a state's "one-year clock" to act on an application for a transmission project in a NIETC has run out. A major concern in this regard is that the state's "clock" should not be deemed to have started until the application filed with the state has been deemed complete. Similarly, FERC's regulations should not deem the one-year state siting "clock" to have run out as long as the state process is being held

¹ Staff notes that the Committee on Regional Electric Power Cooperation ("CREPC"), as well as several other Western states, are proposing to submit comments, which, based on the drafts reviewed so far, Staff agrees with and recommends that the Commission support. Many of the points covered in this Discussion are expected to be incorporated into the comments of CREPC and other Western states.

up by federal agency approvals, including delays related to “another provision of Federal law.”

- FERC’s regulations should provide the same degree of urgency and priority in coordinating and expediting federal agency approvals of siting applications for projects brought before state siting authorities, as it proposes to provide for projects subsequently brought before FERC in its backstop siting role.
- The NOPR provides for both pre-filing and filing processes at FERC. If these processes follow or are superimposed upon pre-filing and filing processes at the state level, there is great potential for duplication, delay and confusion. Either the FERC process should build upon and be coordinated with the state process as fully as possible, or else, the FERC process should not start until it has been determined with high likelihood that FERC siting preemption will in fact be triggered.
- The proposed regulations implementing NEPA are unclear on the kind or range of alternatives to a transmission project in a NIETC that should be considered. This is of particular importance when a major objective of a proposed transmission project is to access renewable resources or when an environmentally superior alternative to the project is not located in a NIETC.
- There is no provision in the proposed regulations for FERC to acknowledge and make use of procedural steps, public outreach, and substantive findings already made by the state. In effect, the proposed rules require members of the public who have participated in a state review for at least a year to start participating anew in a federal process.
- The proposed regulations do not provide any process for the state being preempted to argue that it did not, in fact, withhold or unreasonably condition a necessary state approval. In fact, the proposed rules do not even provide for the state being preempted to receive notice.
- The proposed regulations do not adequately address how the project proponent proposes and expects to initially finance the project and ultimately recover its costs.

ACTION REQUESTED:

Legal Division and Energy Division request authorization to submit comments on the FERC’s NOPR that are consistent with the foregoing discussion. Since comments will not be due for several weeks from the date of this memorandum, staff is still developing

its proposed comments. However, when finalized, staff's comments will simply elaborate upon the points discussed above in greater detail.

Assigned Staff: **Laurence Chaset (LAU, 5-5595); Keith White (KWH, 5-5473).**

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